IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Pima County Attorney, on behalf of the State of Arizona, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, (Appendix A infra 3a-38a) (as amended by the order of the Ninth Circuit on August 13, 1979, Appendix D infra at 58a-59a) are reported at 60__ F.2d at ____. [The original per curiam opinion of the Court of Appeals, (Appendix B infra at 39a-40a) issued July 31, 1978, was withdrawn by the Court of Appeals on July 9, 1979, when the Court of Appeals granted the Petitioner-State's petition for rehearing, and the instant majority and dissenting opinions were substituted.] The order of the district court is reported at 445 F.Supp. 1123 (D. Ariz. 1977) (Appendix C infra at 41a-57a).

JURISDICTION

The judgment of the Court of Appeals (Appendix A infra at 1a-2a) was entered on

July 9, 1979. The State's petition for rehearing and suggestion for rehearing en banc was denied on September 10, 1979 (Appendix E infra at 60a-61a). The time for filing this petition was extended ten days until October 20, 1979 by order of Justice Rehnquist on October 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

QUESTIONS PRESENTED

1. Whether a state is stripped of all appellate rights that exist under federal law (18 U.S.C. 3731 and 28 U.S.C. 1291) and applicable state law, when a state criminal prosecution is removed by the defendant to federal court pursuant to 28 U.S.C. 1442(a)(1).

2. Whether a federal district court has jurisdiction to enter a judgment of

acquittal on its own motion eleven months after the jury has returned a guilty verdict, and beyond the seven-day period provided for in Federal Rule of Criminal Procedure 29(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

18 U.S.C. 3731 provides in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

The provisions of this section shall be liberally construed to effectuate its purpose."

28 U.S.C. 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. 1442(a)(1) provides:

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority

claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

Federal Rule of Criminal Procedure 29(c) provides:

"(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

STATEMENT

1. On March 15, 1976 at 9:00 p.m. Respondent MANYPENNY was on duty as a United States Border Patrol agent (Tr.* 146, 155, 281). Respondent MANYPENNY, along with Border Patrol Agent Hjelle, were suppose to stop and take into custody illegal aliens entering the United States through a well-known illegal alien route, Sweetwater Pass located within Pima County, Arizona (Tr. 44, 243). Three Mexican males were heading north, seeking work. They had nothing with them but food and clothing (Tr. 15, 23, 294). One of the three aliens, victim Elfego Mendoza, when confronted by Agent Hjelle, turned and ran south along the path back towards the Mexican border (Tr.

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*Tr. refers to reporter's transcript of Respondent's trial.

273, 284). When victim Mendoza was approximately 150 feet south and below where Respondent MANYPENNY was positioned, (Tr. 259) Respondent MANYPENNY fired his shotgun three separate times (Tr. 61, 170, 176, 178). Three twelve-gauge shotgun shells were found within eight inches of one another (Tr. 61-62).

Two of the three shotgun shells contained birdshot, the third shell contained double ought buckshot (Tr. 66). At least one of the two shells containing birdshot hit the victim in the buttocks, causing multiple wounds (Tr. 105-106). One of the pellets from the double ought buckshot shell hit the victim in the back of his neck, (Tr. 55) severing his spinal cord (Tr. 59), turning him into a quadraplegic (Tr. 85, 86).

Respondent MANYPENNY at first claimed his victim had not been shot, but had instead "slipped and fallen" (Tr. 22, 38-39). Later that night, Respondent MANYPENNY suggested that the two other Mexican aliens, who were potential witnesses against him, be deported (Tr. 41).

Two weeks later, Respondent MANYPENNY, with his attorney present, had a conversation with two Pima County Arizona prosecutors, concerning the events surrounding the shooting. At this time Respondent MANYPENNY gave three different versions of why he shot the victim (Tr. 112-120).

At trial, Respondent took the stand and testified that he fired the first shot into the air (Tr. 170); the second shot went off because the gun "misfired" while he was reloading (Tr. 176); the third shot also went off by "accident" (Tr. 178).

Respondent MANYPENNY testified that he knew it was only a misdemeanor to enter the United States illegally (Tr. 123); and that he knew he was not allowed to shoot a misdemeanor offender (Tr. 274, 311).

2. Respondent MANYPENNY was charged by the State of Arizona with Assault With A Deadly Weapon in violation of A.R.S. § 13-249(A) and (B). On Respondent MANYPENNY'S motion, the case was removed to federal court for trial pursuant to 28 U.S.C. § 1442(a)(1). After a trial, on November 6, 1976, the jury returned a verdict of guilty as charged. Respondent MANYPENNY then moved for arrest of judgment, or in the alternative, for a new trial pursuant to Federal Rules of Criminal Procedure 33 and 34. The federal district court granted the Respondent's motion for arrest of judgment. The Petitioner-State

then moved for reconsideration of this ruling. The federal district court granted the State's motion for reconsideration of its ruling, but took no further action for almost one year. On September 8, 1977, Respondent MANYPENNY moved for a hearing to determine the status of the Petitioner-State's pending motion. This hearing was held on September 26, 1977. Two days later, the district court reversed its previous order arresting judgment. The district court, sua sponte, decided to construe Respondent MANYPENNY'S Rule 34 motion for arrest of judgment as a Rule 29(c) motion for judgment of acquittal, despite the fact that Respondent MANYPENNY had never filed a Rule 29(c) motion. The district court then granted its own motion for judgment of acquittal, and held Respondent MANYPENNY not guilty. Arizona v. Manypenny, 445 F.Supp. 1123 (D. Ariz. 1977) (Appendix C infra at 41a-57a).

3. The Petitioner-State then filed a timely notice of appeal pursuant to 18 U.S.C. 3731. The Court of Appeals for the Ninth Circuit originally issued a per curiam opinion (Appendix B infra at 39a-40a) on July 31, 1978, dismissing the Petitioner-State's appeal on double jeopardy grounds despite the fact that the double jeopardy issue had never been briefed by the parties nor mentioned at oral argument. The per curiam opinion read:

> "We assume arguendo that the State of Arizona, in its criminal prosecution which was removed to the federal court, has the same right of appeal under 18 U.S.C. § 3731 as is conferred on the United States in a federal prosecution. On the facts of this case, however, a judgment of acquittal was entered, and that judgment is final and unreviewable. Sanabria v. United States, ____ U.S. ____, 46 U.S.L.W. 4646 (June 14, 1978). Accordingly, the appeal is dismissed." (Ibid. infra at 39a-40a.)

The Petitioner-State then filed a timely petition for rehearing and suggestion for rehearing en banc pointing out to the Court of Appeals that its opinion was in direct conflict with a series of recent United States Supreme Court decisions, and was also in direct conflict with two prior decisions by the Ninth Circuit itself, and also in conflict with every prior decision on this issue by the other Circuits.[1]

4. On July 9, 1979, the Court of Appeals granted the Petitioner-State's petition for rehearing, withdrew its prior opinion and substituted the instant majority and dissenting opinions (Appendix A infra at 1a-38a). The majority, per Judge Choy, acknowledged that:

> "We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to 'prevent erroneous trial court rulings from thwarting

> lawful prosecutions,' is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the delicate balance of our federal system." (Ibid. infra at 8a.)

Nonetheless, the majority concluded that:

> ". . . only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution. Thus far, Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal.
>
> APPEAL DISMISSED." (Ibid. infra at 11a.)

The majority did not reach or discuss the merits of the Petitioner-State's appeal.

Judge Kennedy, in his dissent found that:

> "There are two possible sources of jurisdiction, 18 U.S.C. § 3731 and 28 U.S.C. § 1291." (Ibid. infra at 15a.)

Judge Kennedy's dissent first examined the jurisdictional issue at length and found:

> "I conclude not only that there is jurisdiction, but that the judgment ought to be reversed." (Ibid. infra at 24a.)

Judge Kennedy then considered possible double jeopardy problems posed by the Petitioner-State's appeal and concluded there was no double jeopardy barrier to this appeal (ibid infra at 24a-30a). Turning to the merits of the district court's ruling, Judge Kennedy rejected the Petitioner-State's contention that the district court was without jurisdiction to sua sponte enter a judgment of acquittal eleven months after the jury returned a guilty verdict. Judge Kennedy's dissent noted that:

> "At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal. United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437, 439 (10th Cir. 1968). See also United States v. Homer, 411 F.Supp. 972, 975 (W.D. Pa.), aff'd on other grounds, 545 F.2d

> 864 (3rd Cir. 1976), cert. denied, 431 U.S. 954 (1977). The defendant did file motions for arrest of judgment and for a new trial within the time limits prescribed by rules 29(c) and 34. The court having retained jurisdiction over the case, I think it had discretion to consider entry of a judgment of acquittal on its own motion, where it was convinced there had been a fundamental error in its instructions, Fed. R. Crim. P. 2.
>
> I conclude further, however, that the trial court misused its discretion in granting a judgment of acquittal." (Ibid. infra at 30a-31a.)

Judge Kennedy's dissent then discussed the merits of the Petitioner-State's appeal and concluded his dissent by stating:

> "I would hold that this court has jurisdiction and reverse and remand." (Ibid. infra at 34a.)

5. On August 13, 1979, the Court of Appeals, acting upon the Petitioner-State's request, issued an order amending the

dissenting opinion to correct a factual error (Appendix D infra at 58a-59a). The opinion of the Court of Appeals (Appendix A infra at 1a-38a) is reproduced in this petition for certiorari as amended by the Court's order of August 13, 1979.

6. The Petitioner-State filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied on September 10, 1979, necessitating the instant petition for a writ of certiorari (Appendix E infra at 60a-61a).

7. On October 2, 1979, Justice Rehnquist, acting on Petitioner's motion, extended the time for filing this petition a period of ten (10) days until October 20, 1979.

REASONS FOR GRANTING THE WRIT

The instant case presents this Court with an opportunity to resolve two questions that fit squarely within the criteria set forth by this Court's Rule 19.1(b) as guidelines governing this Court's exercise of it certiorari jurisdiction.

I.

The majority's interpretation of of 18 U.S.C. 3731 is in conflict with this Court's decisions in United States v. Wilson, 420 U.S. 332, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975); and United States v. Helstostki, ____ U.S. ____, 61 L.Ed.2d 12, 91 S.Ct. ____ (June 18, 1979). In Wilson, this Court referring to 18 U.S.C. 3731, wrote:

> "While the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers

to Government appeals and to allow appeals whenever the Constitution would permit." 420 U.S. at 337. (Emphasis added.)

This Court reaffirmed the interpretation of 18 U.S.C. 3731 just this year in United States v. Helstostki, supra. Footnote 6 reads in relevant part:

> "In United States v. Wilson, 420 U.S. 322, 337, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975), we concluded that the purpose of the section was 'to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.' See also United States v. Scott, 437 U.S. 82, 84-84, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978); HR Conf Rep No. 91-1768, p 21, reprinted in 1970 U.S. Cong Code & Admin News 5842, 5848; S Rep No. 91-1296, pp 2-3 (1970); 116 Cong Rec 35659 (1970) (remarks of Sen. Hruska). There are no constitutional barriers to this appeal and we conclude that the appeal was authorized by § 3731." 61 L.Ed.2d at 22. (Emphasis added.)

Despite the fact that 18 U.S.C. 3731 includes a specific provision reading:

> "The provisions of this section shall be liberally construed to effectuate its purposes."

the majority felt that the use of the term "United States" in 18 U.S.C. 3731 precluded an appeal by a state under the authority of 18 U.S.C. 3731 (Appendix A infra at 7a). This Court's opinion in Wilson does not use the term "United States"; the opinion continually uses the term "Government" when referring to the prosecution.[2]

The majority's interpretation of the legislative intent behind 18 U.S.C. 3731 is also inconsistent with this Court's decision in United States v. Sisson, 399 U.S. 267, 26 L.Ed.2d 608, 90 S.Ct. 2117 (1970). In Sisson, this Court discussed the concerns of Congress that led to the enactment of the predecessor of the current version of 18 U.S.C. 3731:

> "Their primary purpose was perhaps best expressed by Attorney General Miller in his 1892 report: 'As the law now stands . . . it is in the power of a single district judge, by quashing an indictment, to defeat any criminal prosecution instituted by the Government.'" 399 U.S. at 293. (Emphasis added.)

The instant case, as the dissenting opinion of Judge Kennedy points out (Appendix A infra at 17a-18a, 31a) is a case where a valid criminal prosecution, instituted by the government, has been effectively and erroneously blocked by a single district judge. If this Court meant in Sisson, that the concern of Congress was that prosecutions by the United States Government were subject to defeat by a single federal district judge; and if this Court meant in Wilson and Helstostki that the latest amendment to 18 U.S.C. 3731 meant that Congress intended to allow appeals only by the United States Government

"whenever the Constitution would permit", then this case provides an excellent opportunity to clear up these ambiguities.

The majority opinion also conflicts with this Court's decision in State of Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1879) (at 271-272) and two Sixth Circuit cases, Carter v. Tennessee, 18 F.2d 850 (6th Cir. 1927); and Miller v. Kentucky, 40 F.2d 820 (6th Cir. 1930). These cases all held that in removal prosecutions, the federal district court is suppose to apply the "substantive" law of the state and federal "procedural" law. The Advisory Committee Note to Federal Rule of Criminal Procedure 54(B)(1) states this in no uncertain terms.[3] The right to appeal is either a "substantive" or "procedural" right; (this is discussed at length in Footnote number 1

of Justice Kennedy's dissent, Appendix A infra at 35a-37a) if this Court deems such right to be "substantive", then Arizona law authorizes this appeal as Judge Kennedy points out (Appendix A infra at 21a, 23a). If this Court deems such right to be "procedural" then Tennessee v. Davis, supra; Carter v. Tennessee, supra; and Miller v. Kentucky, supra, (all cited in the Advisory Committee Note) clearly stand for the proposition that in a removal prosecution the state government stands in the shoes of the United States Government for procedural purposes, and has all the procedural rights of the United States Government, including the right to appeal pursuant to 18 U.S.C. 3731. Irrespective of whether the right to appeal is deemed substantive or procedural, the result reached by the majority is in conflict

with Tennessee v. Davis, Carter and Miller. This case presents an opportunity to review the continuing validity of the principles announced in Tennessee v. Davis in the context of prosecutorial appellate rights, and to resolve the apparent conflict between the Sixth and Ninth Circuits on this issue. It also provides an opportunity for the Court to determine whether the Advisory Committee Note to Rule 54(B)(1) is correct or mistaken.

Assuming arguendo that this Court agrees with the majority's restrictive interpretation of 18 U.S.C. 3731, this case also presents, again as an issue of first impression, the question of whether a state may appeal in a removal prosecution pursuant to 28 U.S.C. 1291. 28 U.S.C. 1291 reads in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ."

Judge Kennedy's dissent (Appendix A infra at 18a-22a) found that 28 U.S.C. 1291 provided an alternative basis of jurisdiction for the Court of Appeals to hear the State's appeal.

The majority's ruling that a state is without any appellate rights in a removal prosecution conflicts in principle with many of this Court's recent decisions concerning federalism and the Tenth Amendment.

In National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), this Court, per Justice Rehnquist stated:

> "[5] This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred

by Art I of the Constitution. In Wirtz, for example, the Court took care to assure the appellants that it had 'ample power to prevent . . . "the utter destruction of the State as a sovereign political entity,"' which they feared. 392 U.S. at 196, 20 L.Ed.2d 1020, 88 S.Ct. 2017.

* * *

In Fry, supra, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

'While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124, [85 L.Ed. 609, 61 S.Ct. 451, 132 A.L.R. 1430] (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.' 421 U.S., at 547 n 7, 44 L.Ed.2d 363, 95 S.Ct. 1792.

* * *

We have repeatedly recognized that there are attributes of

> sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 842-845.

In Kessler v. Department of Public Safety, 369 U.S. 153, 7 L.Ed.2d 641, 82 S.Ct. 807 (1962), this Court wrote:

> "Yet the statute was upheld. Why? Because the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article 6." 369 U.S. at 172.

See also, Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1978) at 201-202.

In Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), this Court stated:

> "Since the beginning of this country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43.[4]

As Justice Kennedy's dissent points out:

> "My concern with the majority's approach is that as well as producing an anomalous result, it creates serious and difficult problems of federalism. In effect the majority opinion holds that through removal, a state cannot only be deprived of jurisdiction to try a case in its own courts, it can also be completely deprived of any right to appeal that would have existed under state law." (Appendix A infra at 16a-17a.)

The result reached by the majority is inconsistent with federalism and the intent of the founding fathers as manifested both in the Constitution and the Declaration of Independence.[5]

Wholly apart from the question of federalism, the majority opinion has inad-

vertently created a potentially grave problem for the orderly administration of justice in the federal courts; the right of the United States Government to appeal pursuant to 18 U.S.C. 3731 cannot survive the majority's interpretation of the Congressional intent behind its passage. The majority wrote:

> "In conclusion, only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution. Thus far Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal." (Appendix A infra at 11a.)

The majority has ruled that Congress created two distinct classes of criminal defendants in federal court: (1) the ordinary federal defendant, who is subject to an appeal by the prosecution pursuant to 18 U.S.C. 3731 to challenge erroneous rulings in favor of the defendant by the district

court; and (2) federal employees entitled to removal under 28 U.S.C. 1442(a)(1) who now constitute a special "privileged class", free to enjoy the benefits of errors committed in their favor by the federal district court without any possibility of review. Congress cannot set up such a statutory scheme consistent with the Equal Protection guarantee that is embodied in the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 491, 98 L.Ed.2d 884, 74 S.Ct. 693 (1954); C.F. Marshall v. United States, 414 U.S. 417, 38 L.Ed.2d 618, 94 S.Ct. 700 (1974).

Unless someone can think up a "rational basis" for allowing criminals who are employed by the Federal Government these special privileges, the Equal Protection rights of the ordinary federal defendant are violated every time the United States

Government files an appeal under 18 U.S.C. 3731.

The majority's ruling also calls into question the continuing constitutionality of the removal statute itself (28 U.S.C. 1442(a)(1)) for the reasons set forth by this Court in National League of Cities v. Usery, supra; and Younger v. Harris, supra.

This case allows the Court an opportunity to forestall these issues from arising in the lower courts by either reversing the majority, or taking the case as an opportunity to explain why the majority's ruling does not violate the Equal Protection rights of the ordinary federal defendant who has been subjected to a successful government appeal under 18 U.S.C. 3731.

II.

The second question presented for review, (whether a federal district judge has jurisdiction to enter a judgment of acquittal on his own motion beyond the seven-day limit called for in Federal Rule of Criminal Procedure 29(c)) presents this Court with an opportunity to resolve an apparent conflict[6] between the Ninth Circuit and the position taken by both the Fifth Circuit in United States v. Johnson, 487 F.2d 1318, cert. denied, 419 U.S. 825 (1974) and the Tenth Circuit in Rowlette v. United States, 392 F.2d 437 (1968). The apparent position (see Footnote 6 infra at 43) of the Ninth Circuit on this issue also conflicts in principle with this Court's decision in United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed.2d 1610 (1947).

Federal Rule of Criminal Procedure 29(c) reads in relevant part:

> "(c) Motion after discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period."

The Fifth Circuit in Johnson, supra, and the Tenth Circuit in Rowlette, supra, have both held that a trial court is without jurisdiction to consider a Rule 29(c) motion unless it is timely filed within the seven-day period. As Judge Kennedy noted in his dissent, no such motion was ever filed by Respondent MANYPENNY (Appendix A infra at 30a).

In United States v. Smith, supra, this Court ruled that the government was entitled to have its writ of mandamus granted

to require the vacation of an order by a federal district judge granting the defendant a new trial pursuant to Federal Rule of Criminal Procedure 33. The new trial was granted on the Court's own motion beyond the five-day limit for such motions allowed by Rule 33 at that time. (Rule 33 has subsequently been amended to provide for the same seven-day limit that exists in Rule 29(c).) This Court stated per Justice Jackson:

> "Briefly, Judge Smith thought and intervenor argues that the rule prevents a defendant from asking the court to grant a new trial after the times specified, but that it permits the judge to order retrial without request and at any time. The result, in view of annulment of the term limitation, would be that the power of the trial court to grant new trials on its own motions lingers on indefinitely. There are several reasons why this construction of the Rules is not acceptable.
>
> * * *

> We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initative.
>
> * * *
>
> But the extension of that time indefinitely is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." 331 U.S. at 473-476. (Emphasis added.)

If this Court reads the Smith case as applying to all the "Rules", then the decision of the Ninth Circuit is in direct conflict with Smith. If this Court views the Smith case as controlling authority

only as to Rule 33, then this case provides an excellent opportunity for the Court to decide if the Smith Rule should apply to Rule 29(c) also. In the instant case, the trial court, eleven months after the trial, without the benefit of any transcripts, sua sponte entered a judgment of acquittal. The comparison of the reasons advanced by the district court for its action (Appendix C infra at 52a-57a) and the actual trial transcript reveals that the fears expressed by this Court in the Smith case ("uncertainty and dimness of things long past") have indeed come to pass in the instant case. As Judge Kennedy pointed out in his dissent:

> "I conclude further, however, that the trial court misused its discretion in granting judgment of acquittal. The court's ruling was based on the premise that the evidence was insufficient to overcome a defense of immunity under

> Clifton v. Cox, supra. The defense of immunity was not raised or argued at all at trial. The defendant had the burden of raising immunity as an affirmative defense but did not do that." (Appendix A infra at 30a-31a.)

The proper time limitation for granting judgments of acquittal pursuant to Rule 29(c) is an important question affecting the day to day operation of the federal courts and this Court should resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 9th day of October, 1979.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

Daniel Jesse Smith
Deputy County Attorney

FOOTNOTES

1/ The July 31, 1978 per curiam opinion of the Ninth Circuit was in direct conflict with this Court's decisions in the following cases: United States v. Wilson, 420 U.S. 332, 43 L.Ed.2d 232, 95 S.Ct. 1013 (1975); United States v. Martin Linen Supply Company, 430 U.S. 564, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977); United States v. Scott, 437 U.S. 82, 57 L.Ed.2d 65, 98 S.Ct. 2187, reh. denied, 58 L.Ed.2d 197, 99 S.Ct. 226 (1978) footnote 7. The July 31, 1978 opinion was also in direct conflict with two prior Ninth Circuit Opinions: United States v. Rojas, 554 F.2d 938 (1977); and United States v. Dreitzler, 577 F.2d 539 (June 23, 1978). The opinion was also in conflict with every other Circuit that had passed on the issue: United States v. De Garces, 518 F.2d 1156 (2nd Cir. 1975); United States v. Cahalane, 560 F.2d 601 (3rd Cir. 1977); United States v. Burroughs, 537 F.2d 1156 (4th Cir. 1976); United States v. Cravero, 530 F.2d 666 (5th Cir. 1976); United States v. Allison, 555 F.2d 1385 (7th Cir. 1977); United States v. Donahue, 539 F.2d 1131 (8th Cir. 1976); United States v. Calloway, 562 F.2d 615 (10th Cir. 1977).

2/ The majority opinion per Justice Marshall refers to the prosecution as the "Government" thirty-nine times in his majority opinion, and only uses the term "United States" one time, (420 U.S. at 338) to refer to the prosecution. The dissent uses the term "Government" six times and never uses the term "United States" except in citing the names of previous cases.

3/ The Advisory Committee note to Federal Rule of Criminal Procedure 54B(1) reads in relevant part:

> "In such cases the Federal court applies the substantive law of the State, but follows Federal procedure; State of Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648; Carter v. Tennessee, 18 F.2d 850, C.C.A.6th; Miller v. Kentucky, 40 F.2d 820 C.C.A.6th. See, also, State of Maryland v. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449. The rule is, therefore, a restatement of existing law, except that it does not affect whatever power the State prosecutor may have as to dismissal.

4/ This Court went on to state in Younger:

> "This underlying reason for restraining courts of equity from interferring with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their

separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious through it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S. at 44-45.

5/ Indeed, one of the enumerated grievances listed in the Declaration of Independence was a situation remarkably similar to the instant case. The Declaration reads in relevant part:

> "The history of the Present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states:"

The Declaration then goes on to list a series of enumerated grievances, among them:

> ". . . For Protecting them, by a Mock trial, from punishment for any murders which they should commit on the inhabitants of these states. . ."

In the instant case, the same Federal District Court that erroneously granted Respondent's motion in arrest of judgment (Appendix C infra at 43a, 57a) and then sua sponte entered a judgment of acquittal eleven months after the guilty verdict, made the following comment prior to the trial in the instant case. (This was at the hearing on a motion brought by the Respondent-Defendant prior to trial to force the United State's Attorney's Office to defend him in the instant case. The United States Attorney opposed the motion, which was denied.)

"THE COURT

* * *

Now, just what do you think that this sort of conduct by the Department of Justice in failing to come to the aid of a Border Patrol agent is going to do to the morale of your law enforcement agents?" Transcript of August 30, 1976, page 9.

Respondent MANYPENNY has yet to spend one day in jail for twice shooting Elfego Mendoza in the back, crippling him for life, as Mendoza ran south, unarmed, towards the Mexican border. On this record, the instant case presents a classic example of what this Court said Congress was concerned with when it enacted 18 U.S.C. 3731 and its predecessors. (See United States v. Sisson, supra.) For all intents and purposes, the people of the State of Arizona have received little more than the "mock" trial listed as one of the enumerated grievances in the Declaration of Independence. To say the majority opinion would cause some consternation among the founding fathers is probably an understatement.

6/ The majority opinion does not mention this issue although it was properly raised by the Petitioner-State before the Ninth Circuit as Judge Kennedy noted in his dissent (Appendix A infra at 30a). The dissent discussed this issue and rejected the position of the Fifth and Tenth

Circuits. The majority opinion has implicitly rejected the position taken by the other Circuits when it dismissed the State's appeal outright, rather than construing it as a Petition For Mandamus pursuant to 28 U.S.C. 1651. Assuming arguendo that the State has no right to appeal in a removal prosecution, if the district court was without jurisdiction to enter the judgment of acquittal, then the Court of Appeals, and this Court both have jurisdiction by way of mandamum (28 U.S.C. 1651) to order the district court to reinstate the verdict.

In Maryland v. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449 (1925), this Court reviewed Maryland's challenge to the granting of a removal petition by a Federal District Court. This Court per Chief Justice Taft, granted the State's Petition For Mandamus. In discussing the use of this extraordinary remedy, the Chief Justice wrote:

> "Virginia v. Rives, 100 U.S. 313, Virginia v. Paul, 148 U.S. 107, and Kentucky v. Powers, 201 U.S. 1, were cases in which criminal prosecutions by a State, removed to a federal court under asserted compliance with federal statutes, were ordered remanded by writ of mandamus.

* * *

> The writ in those cases was justified by the Court because of the gross abuse of discretion of the lower court, its clear lack of jurisdiction, and the absence of any other remedy. Ex parte Harding, 219 U.S. 363, at p. 373.
>
> * * *
>
> In respect of the removal statute prosecutions, there should be a more liberal use of mandamus than in removal of civil cases. 220 U.S. at 28.

See also, United States v. Weinstein, 452 F.2d 704 (2nd Cir. 1971).

The Petitioner-State did not formally request mandamus relief from the Court of Appeals; it being the position of the State below and in this Court that the State has a right to an appeal. The Petitioner-State, as Justice Kennedy noted supra, did raise and brief this issue, alleging that the District Court was wholly without jurisdiction to even enter a judgment of acquittal. It is the substance and not the label of pleadings that are controlling. See United States v. Rosenson, 291 F.Supp. 867 (E.D. Louisiana 1968); and Martenay v. United States, 216 F.2d 760 (10th Cir. 1954). By failing to order the verdict reinstated, the majority has effectively created a conflict with the other Circuits on this issue.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	ORDER
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Filed: July 9, 1979, Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge

The petition of the State of Arizona for a rehearing of this appeal is granted; and the original per curiam opinion of the court entered herein on July 31, 1978 is withdrawn and there is substituted in its place the attached opinion and dissenting opinion.

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

The State's suggestion for rehearing en banc is rejected, all active members of the court having been advised of the petition for rehearing and suggestion for rehearing en banc and no member of the court having indicated a desire for rehearing en banc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	OPINION
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Appeal from the United States District Court for the District of Arizona

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge

CHOY, Circuit Judge:

The State of Arizona brought this criminal prosecution against Manypenny, a border patrolman of the United States Immigration and Naturalization Service.

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

The State charged Manypenny with assault with a deadly weapon in violation of Arizona law. Ariz. Rev. Stat. § 13-249(A) & (B). On Manypenny's motion, the case was removed to federal court. See 28 U.S.C. § 1442(a)(1).[1/]

After trial, the jury returned a verdict of guilty. Manypenny then moved for arrest of judgment or, alternatively, for a new trial. See Fed.R.Crim.P. 33, 34. The court granted the Rule 34 motion for arrest of judgment. Thereafter, the State moved for reconsideration of the grant of the Rule 34 motion. The court granted the motion for reconsideration, but no action was taken for a year.

On September 8, 1977, Manypenny moved for a hearing to determine the status of the State's pending motion. The hearing was held on September 26. Two days

later, the district court reversed its previous order arresting judgment. The court construed Manypenny's Rule 34 motion to be a motion for judgment of acquittal under Fed.R.Crim.P. 29(c), granted the motion for acquittal, set aside the jury's verdict and held Mannypenny not guilty. Arizona v. Manypenny, 445 F.Supp. 1123 (D. Ariz. 1977).[2/]

The State appeals from these rulings. We find that we are without jurisdiction to entertain such an appeal. We therefore dismiss the appeal.

It is well-settled that the prosecution has no right to appeal an adverse decision absent some statutory authorization. See United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977); United States v. Wilson, 420 U.S. 332, 336 (1975); United States v.

Sanges, 144 U.S. 310, 312, 318-23 (1892).[3/] The State contends that it may appeal the judgment in this case under 18 U.S.C. § 3731, the Criminal Appeals Act.

Section 3731 provides in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes." (Emphasis added.)

While the Supreme Court has stated that § 3731 was "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit," United States v. Martin

Linen Supply Co., 430 U.S. at 568, quoting United States v. Wilson, 420 U.S. at 337, it is manifest that § 3731 is limited by its own terms to appeals by the United States as a prosecuting entity. The statute authorizes "an appeal by the United States," not an appeal by a state or by "any of the United States." As we have previously stated, "'[t]he language of a statute is the best and most reliable index of its meaning, and where the language is clear and unequivocal it is determinative of its construction.'" Smith v. Califano, No. 77-1296 (9th Cir. Mar. 8, 1979), slip op. at 709, quoting, Monte Vista Lodge v. Guardian Life Insurance Co., 384 F.2d 126, 128 (9th Cir. 1967), cert. denied, 390 U.S. 950 (1968).

We note that no court has ever interpreted § 3731 as providing for appeals

by a state in a § 1442(a)(1) prosecution. Moreover, the legislative history of this provision and its predecessors make it clear that Congress was only concerned with appeals by the federal Government. 4/

We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to "prevent erroneous trial court rulings from thwarting lawful prosecutions," is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the delicate balance of our federal system. However, we cannot rewrite § 3731 for Congress. As the Supreme Court has warned:

> "A statute "is not an empty vessel into which this Court is free to pour a vintage that

> we think better suits present day tastes.' United States v. Sisson, 399 U.S. 267, 297 (1970). Considerations of this kind are for Congress, not the courts."

National Broiler Marketing Association v. United States, 46 U.S.L.W. 4620, 4623 (U.S. June 12, 1978), quoted in Smith v. Califano, slip op. at 712.

Neither can we look to state law as providing Arizona with a right to appeal in this case. A case before the federal courts under § 1442(a)(1) is one within the judicial power of the United States, for it arises under federal law. See Tennessee v. Davis, 100 U.S. 257, 262-65 (1879). In a case arising under federal law, federal law, rather than state law, controls. See D'Oench, Dune & Co. v. FDIC, 315 U.S. 446, 456 (1942); Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940); Board of County Commissioners v. United States,

308 U.S. 353, 349-53 (1939); United States v. Crain, 589 F.2d 996, 998 (9th Cir. 1979).

While in certain cases the federal courts may adopt state law as federal law, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); D'Oench, Duhme & Co. v. FDIC, 315 U.S. at 468-72 (Jackson, J., concurring); Board of Commissioners v. United States, 308 U.S. at 349-52; United States v. Crain, 589 F.2d at 999-1000, adoption of state law in this case does not aid the State's case. As previously noted, the prosecution may appeal only where authorized to do so by statute. See United States v. Martin Linen Supply Co., 430 U.S. at 568; United States v. Wilson, 430 U.S. at 336; United States v. Sanges, 144 U.S. at 312, 318-23. Adoption of state law as the federal rule would not meet this requirement of statutory author-

ization, for such a federal rule would be a "common law" rule, even if based upon a state statute. See United States v. Crain, 589 F.2d at 998-1000; United States v. Best, 573 F.2d 1095, 1101 (9th Cir. 1978).

In conclusion, only Congress can authorize an appeal by a state in a § 1442 (a)(1) criminal prosecution. Thus far, Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal.

APPEAL DISMISSED.

FOOTNOTES

1. [reference on page 1]

28 U.S.C. § 1442(a)(1) provides

> A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending.
>
> (1) Any officer of the United States or any agency thereof, or any person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

2. [reference on page 2]

The court stated that its reason for ordering Manypenny's acquittal was that he was entitled to immunity under the principle announced In re Neagle, 135 U.S. 1 (1890). See Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). The immunity defense had not been raised at trial. However, the district court concluded that it had erred in failing to sua sponte instruct the jury on such a defense.

3. [reference on page 2]

In his dissent, Judge Kennedy suggests that tnis court may have jurisdiction over the State's appeal under 28 U.S.C. § 1291, the final judgement rule. We disagree.

The Supreme Court has twice held that general appeals provisions are not sufficiently explicit to overcome the common-law rule that the State may not appeal an adverse decision in a criminal case. United States v. Wilson, 420 U.S. 332, 336 (1975); United States v. Sanges, 144 U.S. 310, 318, 322-23 (1892). A statute expressly giving the State a right to appeal in a criminal case is required. Section 1291 is not such a statute. Neither does § 1291 allow us to refer to state law to determine whether or not the State has a right of appeal. See discussion of state law infra.

4. [reference on page 3]

Nowhere in the legislative history of the various criminal appeals acts does it appear that Congress addressed or even considered appeals by the State in state prosecutions before the federal courts under § 1442. See S. Rep. No. 1296, 91st Cong., 2d Sess. (1970) H.R. Rep. No. 1768, 91st Cong., 2d Sess. (1970) 41 Cong. Rec. 2190-97 (Feb. 4, 1907), 2744-63 (Feb. 12, 1907). The reports and debate on the issue of such acts indicate that Congress was concerned only with the right of the federal

Government to appeal in criminal cases. See S. Rep. No. 1296 at 2, 5, 9-11, 18 H.R. Rep. No. 1768 at 21 41 Cong. Rec. at 2190 (remarks of Sen. Hale) (remarks of Sen. Bacon) (concerned with lower court determinations that acts of Congress unconstitutional), 2760 (remarks of Sen. Spooner) (the United States should have the same right to appeal in federal criminal cases as many of the states do in their own courts).

Re: STATE OF ARIZONA v. WILLIAM DALE MANYPENNY, No. 77-3453

KENNEDY, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that we are without jurisdiction to entertain this appeal.

There are two possible sources of jurisdiction, 18 U.S.C. § 3731 and 28 U.S.C. § 1291. With respect to § 3731, the majority concludes that the section must be confined to the United States. This is a reasonable position and it certainly has textual validity. But while a court cannot ignore the language of the statute, the Supreme Court has warned against "the dangers of an approach to statutory construction which confines itself to the bare words of a statute . . . for 'literalness may be a strangle meaning.'"

Lynch v. Overholser, 369 U.S. 705, 710 (1962) (quoting Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1946)). It is true that no court has ever interpreted section 3731 as providing for appeals by a state; on the other hand we find no holding to the contrary. This is apparently, a case of first impression. The legislative history reveals that Congress simply never considered the question before us. I conclude that Congress did not intend a state to be completely prohibited from appealing in a removed criminal prosecution. My concern with the majority's approach is that as well as producing an anomalous result, it creates serious and difficult problems of federalism. In effect the majority opinion holds that through removal, a state cannot only be deprived of jurisdiction to try a case in its own

courts, it can also be completely deprived of any right to appeal that would have existed under state law.

The original Criminal Appeals Act, 34 Stat. 1246, was the subject of extended congressional debate. See United States v. Sisson, 399 U.S. 267, 293-96 (1970). Upon its enactment, government appeals were limited to a narrow category of cases. The Act was amended in 1971 to permit all appeals that can be maintained consistently with the Constitution, and thus the amendment "remove[d] all statutory barriers to Government appeals." United States v. Wilson, 420 U.S. 332, 337 (1975). The new Act contains a provision that it shall be liberally construed. 18 U.S.C. § 3731. The statutory scheme is designed to prevent erroneous trial court rulings from thwarting lawful

prosecutions. That policy applies with equal force to appeals in those cases in which the state is the prosecuting entity under the removal statute. In view of the sensitive nature of state-federal relations in section 1442(a)(1) removal cases, I do not believe that Congress intended to deprive states of any right to appeal.

Even if one agrees with the majority's interpretation of section 3731, there remains another possible source of jurisdiction, that is, the general grant of appellate jurisdiction under 28 U.S.C. § 1291. In United States v. Sanges, 144 U.S. 310 (1892), the Supreme Court held that the United States cannot appeal in a criminal case without express congressional authorization. The Court surveyed both English and American state precedent

and concluded that the settled practice was that the state could not appeal criminal cases except in accordance with express statutes. The Court then concluded:

> "In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

Id. at 323.

While Sanges is instructive, neither it nor any other case has held that there must be express congressional authorization in order for a state to appeal in federal court.

The rule in English and American law which requires statutory authorization

before the prosecution can appeal is rooted in the concern that a sovereign not be given the uncontrolled right to prolong criminal proceedings against those subject to its jurisdiction. See id. at 315-16. Except for this concern, there is nothing peculiar to a criminal judgment that prevents its being appealed under a general grant of appellate jurisdiction, and this is true regardless of the identity of the prevailing party at trial. By enactment of 18 U.S.C. § 3731 the Government of the United States has determined that its interests are well served by criminal appeals, and that the rights of its citizens are given adequate protection by the double jeopardy clause. Given the purposes of the rule requiring special authority for criminal appeals, it was neither appropriate nor necessary for Congress to speak to the

authority of prosecutors who represent a separate state as the sovereign initiating criminal charges. That question is solely the prerogative of the State of Arizona, and the State allows appeals in cases such as the one before us. The State's authorization should suffice to permit this appeal under the general appellate jurisdiction granted by 28 U.S.C. § 1291.

Construing section 1291 as giving us jurisdiction to hear an appeal by a state where such appeals are explicitly provided for by state law is not inconsistent with the purpose of allowing removal in cases where federal officers are involved. The federal policies at stake -- to provide a fair trial for government officers, free from local bias -- are not furthered by altering the

instances in which appellate review may be secured by the state. Further, following the state rule would violate no other federal policies. For example, the workload of the federal courts, the integrity of the federal forum, the difficulty of complying with state rules, are not involved here.

If one views the right to appeal as substantive, it is completely consistent with the general scheme in removal actions to look to state law.[1] As the Notes of the Advisory Committee state, in section 1441(a)(1) removal cases, "the Federal Courts apply the substantive law of the State, but follow Federal procedure." Notes of the Advisory Committee on Rules, Fed. R. Crim. P. 54(b)(1).

Having proposed two alternative bases of jurisdiction, I realize that

under some circumstances, specifically where the state has not provided for appeals by the state, it will make a difference which theory is relied on. In this case, however, I need not decide between the theories because I conclude that Arizona does provide for appeals by the state.

In State ex rel. Dawson v. Superior Court, 112 Ariz. 123, 538 P.2d 397 (1975), the Supreme Court of Arizona granted appellate review, by certiorari, see Ariz. Rev. Stat. § 12-2001, of a trial court order setting aside a jury verdict of guilty, followed by entry of a judgment of acquittal.[2] After once remanding to the trial court, the Arizona Court of Appeals reviewed the case on the merits and again confirmed the state's authority to seek review of a trial court's entry of judgment of acquittal. State v. Allen, 27 Ariz.App.

577, P.2d 176 (1976). I conclude, therefore, that even if state law were to be controlling, it would not bar Arizona's appeal in this case.[3]

Because the majority reaches a contrary conclusion on this first issue, it has not explored the other problem raised by this case. However, having examined the case, I conclude not only that there is jurisdiction, but that the judgment ought to be reversed.

I turn first to a consideration of whether an appellate ruling favorable to the state would put the defendant twice in jeopardy as a matter of federal law, thus barring the appeal.[4] I think the argument must be resolved against the defendant based on a previous decision of this court and more recent decisions of the Supreme Court of the United States.

The entry of a judgment of acquittal, after the jury has returned a verdict of guilty, may be set aside on review without offending the principle against placing a defendant twice in jeopardy because the jury verdict can be reinstated, obviating the need for a second trial. In this case there was also a motion for new trial that was not denied or otherwise ruled upon by the trial court. It should be deemed pending upon remand. If granted, there would be further proceedings, but only because the defendant has asked for them. This outcome similarly does not violate the double jeopardy clause. The reasons for these conclusions follow.

Our circuit has squarely held that where a jury has returned a verdict and the trial judge subsequently grants a motion for acquittal under rule 29(c),

the prosecution may appeal the judgment, and the jury verdict can be reinstated without violating the double jeopardy clause. United States v. Rojas, 554 F.2d 938 (9th Cir. 1977). The Rojas case was decided before a series of Supreme Court cases, United States v. Scott, 46 U.S.L.W. 4653 (June 14, 1978); Sanabria v. United States, 46 U.S.L.W. 4646 (June 14, 1978); Burks v. United States, 46 U.S.L.W. 4632 (June 14, 1978), and it must be decided, therefore, whether those cases overruled Rojas. I conclude they did not.

In United States v. Scott, the court addressed in footnote 7 the problem we face. Referring to its earlier decision in United States v. Jenkins, 420 U.S. 358 (1975), the Court stated:

> "In Jenkins we had assumed that a judgment of acquittal could be appealed where no retrial would be needed on remand:

> 'When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict.' 430 U.S. at 365. Despite the Court's heavy emphasis on the finality of an acquittal in Martin Linen and Sanabria v. United States, . . . neither decision explicitly repudiates this assumption."

46 U.S.L.W. at 4655, n.7 (citation omitted). This analysis is consistent with the result our court reached in Rojas.

The defendant focuses on language in Sanabria, emphasizing the differences between acquittals and dismissals of the indictment. The reference to acquittals in the Sanabria case, however, is directed to the instance in which a defendant necessarily must be tried again, by reason

of the errors assigned on the prosecution's appeal, because there is no verdict to reinstate. Those considerations are inapposite to the instant case, where there has been a jury verdict which can be reinstated if the prosecution's arguments are accepted. The footnote quoted above from Scott is controlling, as is our Rojas decision.

Our reversal of the trial court's judgment of acquittal would result in reinstatement of the guilty verdict, subject to the defendant's motion for new trial. The defendant originally moved in the alternative for an order arresting judgment for a new trial. Since the district court granted the motion to arrest judgment, the motion for a new trial became moot. If the trial court's judgment were reversed, that motion would no longer

be moot and should be passed on by the district court. Thus, a second trial might be appropriate in this case. If so, however, it would not be ordered as a result of the errors assigned by the prosecution's appeal or as a result of our reversing the judgment of acquittal. The only cause for new trial, if one were granted, would be the defendant's motion for new trial. Where the new trial is granted at the request of the defendant, and there has been no bad faith conduct by the judge or prosecutor, there is no double jeopardy bar. United States v. Dinitz, 424 U.S. 600, 611 (1976). Here the defendant might still pursue the motion for a new trial, based, apparently, on his desire to raise the Clifton defense. That might be a proper request, but since it would be at

his instance double jeopardy concerns are not implicated.

I turn now to the merits of the district court's ruling. As an initial matter, the State argues that the judge lacked jurisdiction to enter a judgment of acquittal because, contrary to the requirements of rule 29(c), the defendant failed to file a proper motion within seven days of the verdict. At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal. United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437, 439 (10th Cir. 1968). See also United States v. Homer, 411 F. Supp. 972, 975 (W.D. Pas.), aff'd on other grounds, 545 F.2d 864 (3rd Cir. 1976), cert. denied,

431 U.S. 954 (1977). The defendant did file motions for arrest of judgment and for a new trial within the time limits prescribed by rules 29(c) and 34. The court having retained jurisdiction over the case, I think it had discretion to consider entry of a judgment of acquittal on its own motion, where it was convinced there had been a fundamental error in its instructions, Fed. R. Crim. P. 2.

I conclude further, however, that the trial court misused its discretion in granting judgment of acquittal. The court's ruling was based on the premise that the evidence was insufficient to overcome a defense of immunity under Clifton v. Cox, supra. The defense of immunity was not raised or argued at all at trial. The defendant had the burden of raising immunity as an affirmative defense but did not do

that. Given the confused state of the evidence, which we discuss further below, this may have been a deliberate trial strategy. In these circumstances the Government cannot be faulted for failing to prove that grounds for immunity were not present. It makes no sense to apply a test of insufficiency of the evidence to a defense not raised at trial and pertaining to a subject that the Government did not have the duty to open. At most, the defendant is entitled to a new trial so that he may have the advantage of the Clifton case in preparing his defense.

Moreover, I think the evidence introduced at the first trial may have permitted a reasonable inference that the defendant was not executing his duties in good faith, and therefore that the judgment of acquittal was improper. The defendant's

theory was that his gun twice went off by accident and coincidentally hit the victim at a distance of 120 feet. The victim was hit in the back by multiple pellets from at least two shells. Three twelve-gauge shotgun shells were found within eight inches of one another to the right of the trail. All three of them had the smell of fresh powder on them. The defendant had no explanation for the shells being so close together. He testified that the accidental shots were fired about fifteen feet apart. In addition, he originally denied that the victim had been shot. Later he told different versions of what happened, at one point stating that he meant to shoot in front of the victim, and other times stating that he shot the man intentionally because he was uncertain whether his partner was safe. Finally, the defendant

testified that when a suspected illegal alien runs back towards the border, as the victim was doing, it is normal procedure to let him go. He gave no explanation why that practice was not followed in this case.

On remand, the district court would have the defendant's motion for a new trial before it. I express no opinion on the propriety of granting this motion as it rests largely with the trial court's discretion. I do note that Clifton did not create a new defense. The immunity defense for federal officers has been in existence since In re Neagle, 135 U.S. 1 (1890); Clifton reaffirmed the existence of federal officer immunity.

I would hold that this court has jurisdiction and reverse and remand.

FOOTNOTES

1/ The analysis of whether the right to appeal is substantive or procedural is not governed, in a strict sense, by the principles of Erie Railroad v. Thompkins, 304 U.S. 64 (1938), and its progeny, see, e.g., Hanna v. Plumer, 380 U.S. 460 (1965), for this case is not in federal court because of diversity jurisdiction. The instant case concerns the actions of an officer in his federal capacity and by the removal statute, 28 U.S.C. § 1442(a)(1), Congress has made the implicit declaration that such suits are ones arising under the laws of the United States. Osborn v. United States, 22 U.S. (9 Wheat.) 738 (1824); Tennessee v. Davis, 100 U.S. 257 (1880). There is no Rules of Decision Act, 28 U.S.C. § 1652, or Rules Enabling Act, 28 U.S.C. § 2072, which governs the choice of law analysis in such actions. Cf. Notes of Advisory Committee on Rules, Fed. R. Crim. P. 54 (b)(1) (in section 1441(a)(1) removal cases, "the Federal Court applies the substantive law of the State, but follows Federal procedure"). The Erie line of cases, however, would be useful by analogy, for if we were to say the right in question is a substantive one and conclude further that Congress has by statute prescribed a federal standard which overrides the state rule on a point which has no bearing upon federal interests in the case, (interests such as the defense of immunity and providing a neutral forum for the trial of federal officers), then we would be exercising federal jurisdiction in a sensitive, perhaps new, dimension. Accordingly, I think the

Erie line of cases, adopting a general distinction between substantive and procedural rights, would help resolve a choice of law question as to the right of appeal in this case.

The Government's right to appeal in a criminal case could be characterized as substantive, since a particular jurisdiction may afford to the defendant greater protection against multiple trials than is required by the minimum dictates of the fifth amendment double jeopardy clause. See the debates on the first Criminal Appeals Act, discussed in United States v. Sisson, 339 U.S. 267, 293-96 (1970). On the other hand, it cannot be doubted that Congress has an interest in assigning the responsibility for ruling on questions of law between federal trial and appellate courts, courts which operate under different constraints than do those of a state, and such concerns seem to be procedural in nature. In making the substantive-procedural determination, we would think that balancing the importance of the state and federal policies implicated would be a significant factor in the inquiry. Cf. Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 717 n.130 (1974); Redish and Phillips, Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma, 91 Harv. L. Rev. 356 (1977) (disagreeing on whether balancing the importance of state and federal policies is appropriate in deciding whether state or federal law should be followed in diversity cases).

What are the state policies supporting its determination of when the

state may appeal? Finality and repose are the principal purposes as well, I suppose, as a desire to correct the more serious errors in the lower court proceedings. These considerations also support state decisions regarding statute of limitations and res judicata questions. Both of these issues, in the Erie context, have been held matters of state law.

Moreover, Arizona and New Mexico cases have held the right to appeal to be a substantive question. State v. Birmingham, 96 Ariz. 109, 392 P.2d 774, 776 (1964); In re Maricopa County, Juvenile Action No. JS-834, 26 Ariz.App. 485, 549 P.2d 580, 583-84 (1976). See Durand v. New Mexico Comm'n on Alcoholism, 89 N.M. 434, 553 P.2d 715, 715 (Ct.App. 1976).

Of course, some parts of state appeals statutes might be framed so that compliance by the federal court with all their provisions would be impossible (e.g., specifying which district or which intermediate court of appeals is the proper forum for hearing the appeal). For these questions, federal law and procedure would control. But as to the basic question whether the state can secure appellate review, state law can be accomodated by the federal system.

2/ It is quite possible that Arizona courts would permit the state to appeal in this case under Ariz. Rev. Stat. § 13-4032 (5), which permits the state to appeal from "[a]n order made after the judgment affecting the substantial rights of the state." See Ariz. R. Crim. P. 24.2; Rules of the

Supreme Court of Ariz. 22(c)(3); State v. Birmingham, 96 Ariz. 109, 392 P.2d 775 (1964) ("order" and "judgment" are synonymous as used in the civil appeals statute, Ariz. Rev. Stat. § 12-2101); State v. Allen, 557 P.2d at 182-83. Even if no right of appeal existed under § 13-4032, however, appellate review is appropriate under the certiorari statute.

3/ Arizona courts have held that although the certiorari statute speaks of review to determine whether the lower court lacked jurisdiction, the statute also permits review to determine whether a lower court abused its discretion. See, e.g., State ex rel. Dawson v. Superior Court, 112 Ariz. 123, 538 P.2d 397, (1975); State ex rel. Ronan v. Superior Court, 95 Ariz. 319, 390 P.2d 109 (1964) ("A writ of certiorari may be used to review abuse of discretion."); Jones v. Lopez Plascencia, 10 Ariz.App. 253, 458 P.2d 120 (Ct. App. 1969).

4/ If this appeal is viewed as falling under § 3731 then the question of double jeopardy is jurisdictional because that section provides that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." If jurisdiction is found by virtue of § 1291 then the double jeopardy issue still must be reached, though technically the presence of double jeopardy is a constitutional bar to a second trial, not a jurisdictional defect in this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	OPINION
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Appeal from the United States District Court for the District of Arizona

Filed: July 31, 1978, Emil E. Melfi, Jr. Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge.

PER CURIAM:

We assume arguendo that the State of Arizona, in its criminal prosecution which was removed to the federal court,

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

has the same right of appeal under 18 U.S.C. § 3731 as is conferred on the United States in a federal prosecution. On the facts of this case, however, a judgment of acquittal was entered, and that judgment is final and unreviewable. Sanabria v. United States, ____ U.S. ____, 46 U.S.L.W. 4646 (June 14, 1978). Accordingly, the appeal is dismissed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR-76-377-TUC-WCF
	)	
vs.	)	
	)	
WILLIAM DALE MANYPENNY,	)	ORDER
	)	
Defendant.	)	
	)	
	)	

Filed: September 28, 1977, 2:02 P.M., W. J. Furstenau, Clerk, U.S. District Court for the District of Arizona

While acting as a Border Patrol Officer the defendant, William Dale Manypenny, shot and injured a fleeing alien. The event occurred on the Organ Pipe National Monument in Pima County, Arizona, not far from the Mexican border, or perhaps on the Papago Indian Reservation which is also in Pima County. Manypenny was indicted

in the Pima County Superior Court for assault with a deadly weapon or instrument, a violation of A.R.S. Section 13-249A and B. The case was removed to this Court pursuant to Title 28, United States Code, Section 1442(a)(1). The defendant was tried and the jury returned a verdict of guilty. When defendant moved for new trial and for arrest of judgment, the Pima County Attorney failed to respond and the motion to arrest judgment was granted. The County Attorney immediately moved for reconsideration and this Court granted the motion.

The motion for arrest of judgment contended that the State of Arizona, and therefore this Court on removal, had no criminal jurisdiction over the land within either the Organ Pipe National Monument

or the Pagago Indian Reservation. Defendant also contended that the area of immigration is preempted by the United States and that his prosecution is an attempt at regulation of immigration, and, therefore, void. He argued further that the federal criminal laws must be applied to his acts instead of Arizona laws, Title 18, United States Code, Section 13 and that his acts as a federal officer are not within the jurisdiction of the State.

The Court finds on reconsideration that Arizona has criminal jurisdiction over both the Organ Pipe National Monument and the Papago Indian Reservation, that the Arizona statute is not void as applied to the area of immigration and that the Arizona criminal statute can be used as to events occurring on said lands. However,

the Court also finds that officers acting under color of federal law have a perfect defense to state criminal prosecutions when their actions are honestly and reasonably believed to be necessary and proper in carrying out their federal duties and that such defense is here established.

Jurisdiction over the place of occurrence will be discussed first. The general rule is that a state has complete jurisdiction over the land within its exterior boundaries. United States v. McBratney, 104 U.S. 621 (1881); People v. Martin, 326 U.S. 496, 66 S.Ct. 307 (1946). There are three exceptions. The first is provided by Article I, Section 8, Clause 17 of the Constitution of the United States. The United States has exclusive jurisdiction

over land "purchased" by the United States "by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings". Since the land here in question was not "purchased" and is not for one of the specified purposes, the first exception is admitted by defendant not to apply. Fort Leavenworth R. Co. V. Lowe, 114 U.S. 525, 5 S.Ct. 995 (1885). Some examples of such land in Arizona are provided by A.R.S. Sections 26-251 through 253 (land for military purposes) and Sections 37-611 through 613 (land for penal purposes).

A second exception is recognized when a state affirms the United States' retention of exclusive jurisdiction at the time it is admitted into the Union. Defendant strongly urges the argument that Arizona

has so affirmed in Section 20 of its Enabling Act, 36 Stat. 557, 1 A.R.S., p. 81 and Article XX, Paragraph Fourth of Arizona's Constitution, 1 A.R.S. P. 181:

> "Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Draper v. United States, 164 U.S. 240, 17 S.Ct. 107 (1896), interpreted a clause from the Enabling Act of Montana which is very similar to Arizona's Enabling Act and which appears indistinguishable

for the purposes of this case. The holding of the case was that the United States had no jurisdiction over a non-Indian who murdered a non-Indian on an Indian reservation and that Montana did have jurisdiction. The reasoning of the case was that the "absolute jurisdiction" language of the Act was intended only to preserve the complete control of the United States over the title to Indian lands owned by Indians outside of reservations. The United States had an interest in preventing the State of Montana from frustrating federal limitations on the alienability of Indian lands.

Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562 held that the disclaimer of "right and title" in a similar clause by Alaska was a disclaimer of propriety rather than governmental interest.

It held further that "absolute" means undiminished, not exclusive.

These cases show that Arizona did not disclaim governmental interests over any land within its external boundaries by this clause in its Constitution. Even a military reservation comes under the jurisdiction of the state on statehood when there is no express savings clause to prevent it. Fort Leavenworth R. Co. v. Lowe, supra. For an example of such an express savings clause, see, the Act admitting the State of Wyoming into the Union, 26 Stat. 222 and Title 16, United States Code, Section 24 (Yellowstone National Park).

The third exception is the cession of jurisdiction to the United States by an individual state after statehood. Collins v. Yosemite Park and Curry Co., 304 U.S.

518, 58 S.Ct. 1009 (1938). Yosemite National Park came under the qualified jurisdiction of the United States by this means in 1919. Many National Parks and National Monuments are now under the "sole and exclusive" jurisdiction of the United States. Eg., Title 16, United States Code, Sections 95, 117, 124, 157 and many others. No such cession of jurisdiction was ever made by Arizona until 1976 after the events in this case. See 1964 U.S. Code Cong. & Ad. News 3923 recognizing the facts as they then stood; and A.R.S. Section 37-620, Laws 1976, Ch. 54, Section 1 which cedes concurrent rather than exclusive jurisdiction to the United States over the Organ Pipe Cactus National Monument and other parks, monuments, forest and dams.

Since Arizona does have jurisdiction over the land in question, its power

to prosecute an Immigration Officer acting under color of his federal duty must be examined. Further, since the Arizona criminal law concerning assault with a deadly weapon is not a direct attempt to regulate immigration and since it expresses legitimate State concerns, the preemption doctrine does not prevent the applicability of this law unless it is an unreasonable burden on the implementation of federal immigration policy. Cf., Southern Pac. Co. v. State of Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945). This is apparently the exact intent of Congress. Title 8, United States Code, Section 1358 provides for local jurisdiction within immigration stations to enforce state criminal laws. The reasonableness of the burden in this situation appears to this Court to involve many of the same consider-

ations as the official duty doctrine protecting federal officers as set out In re Neagle, 135 U.S. 1, 10 S.Ct. 658 (1890); and Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). Therefore, these two matters will be discussed together later herein.

People v. Martin, supra, sufficiently answers defendant's contention that only the federal criminal statutes can be applied to him even by the State. When there is concurrent jurisdiction, the State may use its own criminal statutes to prosecute.

Clifton v. Cox, supra, thoroughly reviews the history and the present status of the doctrine set out in the landmark case of In re Neagle, supra. It is not necessary for this Court to repeat the reasoning from Clifton; it is sufficient

to summarize the holding:

If a person is authorized to do an act by the law of the United States and if he does no more than what is necessary and proper for him to do, he is innocent of any crime against the laws of any state. This is true if the acts are within the outer perimeter of his line of duty, taking into account that the concept of duty encompasses the sound exercise of discretionary authority. Further, even when an act is not actually authorized, errors of judgment in what one conceives to be his legal duty will not, alone, serve to create criminal responsibility of a federal officer. An officer's acts are <u>not</u> necessary and proper only if the official employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent. The finder

of fact may find that the actions were not reasonable under all of the circumstances; however, when the evidence shows that the officer honestly believed them to be reasonable, he must be found innocent.

As limited by this doctrine, Arizona's criminal law against assault with a deadly weapon cannot be said to be an unreasonable burden on the implementation of federal immigration policies. Congress has provided two procedural devices in addition to this judge-shaped doctrine which protect federal officers and federal policies. They are the habeas corpus provision, Title 28, United States Code, Section 2241(c)(2), used in Clifton, and the removal statute, Title 28, United States Code, Section 1442(a)(1), used in the present case. These three limitations are all the protection that the federal

immigration policy requires. State criminal law may constitutionally be applied in this case; thus, this Court has jurisdiction.

Prodecurally, it is unclear if the determination as to whether defendant Manypenny was carrying out federal duties in performing the act should be decided as a question of law by the Court or should be decided by a jury as a question of fact. United States ex rel. Drury v. Lewis, 200 U.S. 1, 26 S.Ct. 229 (1906), seems to hold that it is a question of fact for the jury, but Clifton says:

> "The issue of petitioner's scope of authority presents a question of law which we find was properly resolved by the district court." Id., 547 F.2d at 726.

In either event, this Court committed fundamental error; the issue was not

properly resolved by the Court at the time of trial. The Court should have considered this principle of law and thus granted defendant's motion for verdict of acquittal or failing that should have submitted the matter to the jury on altogether different instructions which embodied this federal law on the matter of the officer's reasonable belief.

Again, in either event, it now appears that the procedurally correct method of rectifying the error after trial was not to arrest judgment pursuant to Title 28, United States Code, Federal Rules of Criminal Procedure, Rule 34, but to grant a judgment of acquittal pursuant to Rule 29(c) or a new trial pursuant to Rule 33. On reconsideration, the Court must reverse its arrest of judgment and proceed with matters as they now stand.

In order to secure simplicity in procedure, fairness in administration and the just determination of this proceeding, this Court will consider the motion for arrest of judgment as a motion under Rule 29(c) for judgment of acquittal. Federal Rules of Criminal Procedure, Rule 2; cf., United States v. Baker, 432 F.2d 994 (10th Cir. 1970).

The test for such a motion is whether, viewing the evidence in light favorable to the government, there is relevant evidence from which the jury could reasonably find that the defendant was guilty beyond a reasonable doubt. United States v. Rojas, 554 F.2d 938 (9th Cir. 1977), Applying the standards set out in Clifton v. Cox, supra, and considering further the standard in Rojas, the Court

finds that a reasonable jury could not conclude defendant's guilt beyond a reasonable doubt. The motion for judgment of acquittal shall be granted.

IT IS ORDERED that the Order of this Court entered November 30, 1976, is vacated, the motion for arrest of judgment heretofore granted is reconsidered and denied.

IT IS FURTHER ORDERED that considering the motion for arrest of judgment as a motion for judgment of acquittal, the motion is granted, the verdict rendered herein is set aside; defendant William Dale Manypenny, is ADJUDGED not guilty.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 27th day of September, 1977.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	ORDER
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Filed: August 13, 1979, Emil E. Melfi, Jr. Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge.

The dissenting opinion is amended as follows:

(1) At page 9, line 6 delete "at least once."

(2) At page 9, lines 7-8 after the words, "The victim was hit," delete

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

"by not less than two pellets" and insert "in the back by multiple pellets from at least two shells."

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,	)	
	)	
Plaintiff-Appellant,	)	No. 77-3453
	)	
vs.	)	ORDER
	)	
WILLIAM DALE MANYPENNY,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

Filed: September 10, 1979, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals

Before: CHOY and KENNEDY, Circuit Judges, and HALL,* District Judge.

The panel as constituted in the above case has voted to deny the second petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no judge of the

*The Honorable Peirson M. Hall, Senior United States District Judge for the Central District of California, sitting by designation.

court has voted to grant rehearing en banc. F.R.App.P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appellant's Second Petition for Rehearing and Suggestion for Rehearing En Banc is ordered filed.